APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CIVIL ACTION No. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; AND SOUTHERN PACIFIC COMPANY, *Plaintiffs,*

and

RINGSBY TRUCK LINES, INC.; NAVAJO FREIGHT LINES, INC.; DENVER CHICAGO TRUCKING COMPANY, INC.; ILLINOIS-CALIFORNIA EXPRESS, INC.; PACIFIC INTERMOUNTAIN EXPRESS CO.; TRANSCON LINES; WATSON-WILSON TRANSPORTATION SYSTEM, INC.; WESTERN GILLETTE, INC.; CONSOLIDATED COPPERSTATE LINES; AMERICAN TRUCKING ASSOCIATIONS, INC.; REGULAR COMMON CARRIER CONFERENCE; FREIGHT FORWARDERS INSTITUTE; TRANS-CONTINENTAL BUS SYSTEM, INC.; AMERICAN BUSLINES, INC.; ARKANSAS MOTOR COACHES LTD., INC.; BAYSHORE BUS LINES, INC.; CONTINENTAL BUS SYSTEM, INC.; CONTINENTAL CRESCENT LINES, INC.; CONTINENTAL PANHANDLE LINES, INC.; CONTINENTAL SOUTHERN LINES, INC.; CONTINENTAL TENNESSEE LINES, INC.; DENVER-COLORADO SPRINGS-PUEBLO MOTORWAY; DENVER-SALT LAKE-PACIFIC STAGES, INC.; CONTINENTAL PACIFIC LINES, INC.; MIDWEST BUSLINES, INC.; SMOKY MOUNTAIN STAGES, INC.; TENNESSEE TRAILWAYS, INC.; UNION BUS LINES, INC.; and MUSCATINE, DAVENPORT AND CLINTON BUS COMPANY, *Intervening Plaintiffs,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

RAILWAY EXPRESS AGENCY, INCORPORATED, and THE GREYHOUND CORPORATION, *Intervening Defendants.*

* * * * * * *

Before BREITENSTEIN, Circuit Judge, and ARRAJ and CHILSON, District Judges.

BREITENSTEIN, Circuit Judge.

This suit concerns the validity of an order of the Interstate Commerce Commission authorizing the issuance of stock by Railway Express Agency, Incorporated (REA), for sale to The Greyhound Corporation.[1] Various carriers and associations protested the Commission action. The plaintiffs are five railroads, all of which are stockholders of REA. Twenty-nine motor carriers, or associations of motor carriers, have intervened as plaintiffs. REA and Greyhound have intervened on the side of the defendants. We have jurisdiction under 28 U.S.C. § 1336. A three-judge district court is required by 28 U.S.C. § 2325.

REA, Greyhound, and the plaintiff railroads are all subject to the Interstate Commerce Act (the Act). REA is a common carrier by express on railroads and a common carrier by motor vehicle. It competes with Greyhound in the transportation of property between points in all states of the United States, except Alaska and Hawaii.

REA filed an application under §§ 20a and 214 of the Act[2] for authority to issue 500,000 shares of its common stock to Greyhound at $20 per share upon certain terms and conditions. Various protests, none of which challenged the facts stated by the applicant, alleged that Greyhound was trying to get control of REA in violation of § 5 of the Act,[3] that the issuance of the stock would not conform to the standards of § 20a, and that an evidentiary hearing should be held. The United States Department of Justice intervened asserting that the Commission should act under § 11 of the Clayton Act[4] to determine if the proposed

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[1] The orders were entered in Finance Docket No. 23324, *Railway Express Agency, Incorporated, Stock,* and in Finance Docket No. 23374, *Southern Pacific Co.* v. *Greyhound Corp. and Railway Express Agency, Inc.*

[2] 49 U.S.C. §§ 20a and 314.

[3] 49 U.S.C. § 5.

[4] 15 U.S.C. § 21.

transaction violated § 7 of that Act.[5] Southern Pacific Company, one of the protestants and a plaintiff herein, filed with the Commission a complaint against Greyhound and REA asserting that the transaction encompassed control or management of REA by Greyhound and requesting action by the Commission under § 5(7) of the Act to forbid the consummation of the proposal.

The Commission held no evidentiary hearing. Its March 15, 1965, order recited the background of the transaction, the corporate situation of REA, and the procedures which had been followed. It said that the filing of a § 5 application is "permissive and may not be required"; that an investigation of possible violations of § 5 of the Act and § 7 of the Clayton Act "would not be appropriate at this time"; and that a hearing was not necessary "for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214." The Commission specifically found that the REA stock issue was lawful, compatible with the public interest, reasonably necessary, and consistent with its intended purpose. The complaint of the Southern Pacific under § 5(7) was dismissed and the stock issue was authorized. This action was then brought to set aside and vacate the order. The Commission has stayed the order until the completion of judicial review.

From 1929 to 1961 REA was operated on a non-profit basis and either leased facilities or used facilities owned by other carriers. In 1961 it changed to a profit-and-loss basis and embarked on a program of capital expenditures to acquire and modernize terminals and equipment. The financing of such program was difficult because of a short history of profitable operations and an unfavorable ratio of debt to equity. Before 1963 only railroads could be stockholders of REA. Although this requirement was then removed, the charter provision that all sales of outstanding shares are subject to a right of first refusal by the railroad shareholders was retained.

In February, 1964, Greyhound submitted a proposal to

[5] 15 U.S.C. § 18.

REA which in essence covered acquisition of control of REA by Greyhound subject to Commission approval. The offer was not accepted. Thereafter meetings of executives of the two companies produced a "Memorandum of Understanding" which outlined "potential savings or advantageous arrangements" which would result from the merger of the companies or the consolidation of certain activities. These included joint use of terminals, garages, communication facilities, and sales solicitation.

In July, 1964, Greyhound made a second offer which, with some modifications, was approved by the REA Board of Directors and stockholders.[6] The terms of the agreement appear in the resolution adopted by the REA Board. The important provisions are:

(1) Greyhound will acquire a 20% stock interest in REA through purchase, at $20 a share, of 500,000 shares of authorized but unissued stock not subject to the right of first refusal;

(2) Greyhound will have a 20% representation on the REA Board;[7]

(3) If the transaction is approved by the Commission and consummated, Greyhound, for a period of 60 days, will stand ready to purchase, at $20 a share, up to 1,000,000 shares of the outstanding REA stock, subject to the right of first refusal;

(4) The REA Board will seriously consider the sale of REA stock to the airlines and the public; and

(5) "The REA Board shall adopt a resolution declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies,

[6] The stockholders approved by a vote of 1,654,572 shares for and 269,800 shares against. The plaintiffs herein own 211,762 shares.

[7] This is to be accomplished by amending the by-laws to increase the board membership from 23 to 25. The numbers of directors nominated by the various railroad districts remain constant but the at-large directors will be increased from 5 to 7.

improve service and increase public receptivity and patronage."

The main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing. Consideration of this issue requires an analysis of the statutes upon which reliance is placed.

The REA application was filed under §§ 20a and 214.[8] Section 20a(2) declares that a carrier shall not issue stock without Commission authorization. Section 20a(6) says: "The commission may hold hearings, if it sees fit, to enable it to determine its decision upon the application for authority." Accordingly, on a § 20a(2) application the Commission has the discretion to determine whether a hearing shall be held.

Section 5(2)(a)(i) covers, among other things, acquisitions of control of one carrier by another through stock ownership and makes such acquisition lawful if approved by the Commission. Section 5(2)(b) requires a carrier seeking authority for such a transaction to present an application to the Commission. Section 5(4) makes it unlawful for a person to enter into a transaction within the scope of § 5(2)(a) without compliance therewith. Section 5(7) authorizes but does not require the Commission on complaint or on its own initiative, but after notice and hearing, to investigate and determine whether any person is violating § 5(4). Here again the holding of a hearing is discretionary with the Commission.

Section 7 of the Clayton Act[9] prohibits a corporation engaged in commerce from directly or indirectly acquiring in whole or part the stock of another corporation engaged in commerce "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Section 11 of the same act[10] imposes on the Commission the duty of enforcing compliance with § 7

[8] Section 214 makes § 20a applicable to motor carriers.

[9] 15 U.S.C. § 18.

[10] 15 U.S.C. § 21.

where, as here, the parties concerned are common carriers subject to the Interstate Commerce Act. Section 5(11) of the latter act says that the authority conferred thereunder shall be exclusive and plenary and that any carriers participating in transactions authorized or approved under the section "are relieved from the operation of the antitrust laws."

The argument is that approval of the stock issuance may not be given without determination, after hearing, of the question of control arising under § 5 of the Act and of the question of the competitive consequences arising under § 7 of the Clayton Act. Although these are somewhat related we shall consider them separately.

The § 5 question is raised in two ways, by the protests filed to the § 20a application and by the complaint of Southern Pacific under § 5(7). These pleadings do not controvert any facts put of record by REA and do not allege any additional factual matters. The pleaded conclusions add nothing. The briefs suggest that cross-examination of the REA and Greyhound officials who participated in the inter-company negotiations may reveal that the true plan contemplates control of REA by Greyhound but no solid basis is shown for the suggestion.

Control is "an issue of fact to be determined by the special circumstances of each case."[11] The difficulty here is that important and decisive facts are presently unknown. The transaction contemplates the issuance to Greyhound of 500,000 shares out of a total authorization of 2,576,000 shares. The offer of Greyhound to purchase an additional 1,000,000 shares from the present shareholders is subject to such shareholders' right of first refusal. This means that when Greyhound proposes the purchase of any such stock, or a block thereof, all shareholders, including the plaintiffs, may acquire that stock themselves. In its order the Commission noted that Greyhound had been told by railroad representatives, including representatives of the plaintiff railroads, "that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad share-

[11] *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 145.

holders." If Greyhound acquired the 1,000,000 shares it would own over 50% of the REA stock. If the dissident railroads acquired the same amount the shoe would be on the other foot as they would then own nearly 50%.

REA has no executive committee and is governed by a 23-man board of directors. Of these 7, 6, and 5 are respectively nominated by the eastern, western, and southern railroad districts and 5 are chosen at large. The transaction contemplates an increase in the board to 25 members with 5 of the at-large members nominated by Greyhound. Any further change in the board requires the two-thirds vote necessary to amend the by-laws. Even if Greyhound acquires a total of 1,500,000 shares the possibility of a change in the make-up of the board would require the cooperation of other shareholders.

The plaintiffs emphasize that portion of the agreement requiring the REA Board "to consider seriously and work toward" an arrangement for consolidation and cooperation "in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage." This commits REA only to serious consideration. The effect will depend on the outcome of the offer to purchase the 1,000,000 shares and the subsequent actions of the REA Board.

The briefs of the parties devote much space to the Breswick litigation.[12] There the district court first set aside Commission approval of a stock issue on jurisdictional grounds. The Supreme Court reversed noting that the matter of a hearing was governed by § 20a(6).[13] The case was remanded for consideration of whether the stock issue violated the Interstate Commerce Act.[14] The district court after commenting that under § 20a the Commission was not required as a matter of law to hold an evidentiary hearing

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[12] *Breswick & Co.* v. *United States*, S.D.N.Y., 138 F.Supp. 123, reversed *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, decision on remand *Breswick & Co.* v. *United States*, S.D.N.Y., 156 F.Supp. 227, reversed *Alleghany Corp.* v. *Breswick & Co.*, 355 U.S. 415, decision on remand *Breswick & Co.* v. *United States*, S.D.N.Y., 160 F.Supp. 754.

[13] 353 U.S. 151, 175.

[14] Ibid.

went on to say that the Commission could not approve the issuance of stock without determining the control question which had been raised.[15] The Supreme Court again reversed saying in a short per curiam that the only question open on the remand was whether the transaction violated the Act.[16] Our reading of the decisions convinces us that the Supreme Court has left open the question of whether, when a control question is raised, it must be decided in advance of a § 20a approval of the issuance of stock. In our view a categorical answer cannot be given. In some instances consideration of the public interest may require such determination and in other instances it may not. Generally, the question of control must be answered on a case by case basis. Here we have a situation where the Commission has found that the answer cannot be reached on the basis of the presently known facts. Developments subsequent to the stock issuance must be awaited.

The intervening plaintiffs argue that the Commission breached its statutory duty in refusing to institute a proceeding to determine whether the transaction violated § 7 of the Clayton Act. This point was raised before the Commission by the Department of Justice which has not pursued the matter before us. In the interval between Commission action and court hearing the Supreme Court decided Seaboard Air Line R.R. v. United States, 382 U.S. 154. In that case two railroads filed with the Commission an application for authority to merge. The Commission approved subject to certain conditions. The district court reversed, concluding that the Commission's analysis of the competitive effects of the merger was fatally defective because the Commission had not determined whether the merger violated § 7 of the Clayton Act. The Supreme Court reversed the district court, holding on the authority of McLean Trucking Co. v. United States, 321 U.S. 67, 80, 85-87, and Minneapolis & St. Louis Ry. v. United States, 361 U.S. 173, 186, that the Commission may approve a merger notwithstanding a potential violation of the antitrust laws if it makes adequate findings, after weighing the effects of

[15] 156 F.Supp. 227, 230.

[16] 355 U.S. 416.

the curtailment of competition against the advantages of improved service, that the merger would be consistent with the public interest under § 5(2)(b). We see no reason why the principles announced in Seaboard as applicable to a § 5 merger proceeding do not apply to a § 20a stock issuance proceeding. We believe that the Commission has followed those principles. It has not shut its eyes to the competitive effects. All it has done is to say that in the circumstances presented the public interest requires the issuance of the stock and that determination of the competitive effects will be appropriate for consideration after the chain of events started by the stock issuance is ascertainable rather than conjectural.

Whether the approach is under § 5 of the Interstate Commerce Act or § 7 of the Clayton Act the outcome is the same. The Commission has the responsibility of giving effect to the national transportation policy. In the performance of that responsibility the Commission has decided that the REA-Greyhound transaction meets the standards fixed by § 20a(2) and that determination of the control and competition questions must await developments subsequent to the issuance of the 500,000 shares of REA stock to Greyhound. We are convinced that the Commission took the proper course. In Denver Union Stock Yard Co. v. Producers Livestock Marketing Assoc., 356 U.S. 282, 287, the Supreme Court repeated the observation first made in United States v. Storer Broadcasting Co., 351 U.S. 192, 205, that Congress did not intend an agency "to waste time on applications that do not state a valid basis for a hearing." The principle applies here. Until the facts are developed by occurrences after the stock issuance, hearings on control and competitive effects are no more than an exercise in futility. In the circumstances it is not our prerogative to interfere with what we deem to be a reasonable exercise by the Commission of its discretionary powers.[17] The Commission did not decide, and we do not decide, any questions relating to control or competition. They are for the future.

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[17] *See United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 536.

Finally, the intervening plaintiffs argue that the order must fall because the Commission has not made the requisite findings and has not stated the basis of its decision.[18] We do not agree. The facts are not disputed. The Commission decided that it was not appropriate to resolve control and competition questions at this time and that the § 20a(2) standards for approval of stock issuance had been met. In our opinion the Commission order is clear and understandable and presents an adequate basis for judicial review.

The clerk shall forthwith enter judgment for the defendants dismissing the action.

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[18] *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169; *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 93-95, 332 U.S. 194, 196-197.

APPENDIX B

Service date:
March 16, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 15th day of March, A.D. 1965.

Finance Docket No. 23324

RAILWAY EXPRESS AGENCY, INCORPORATED, STOCK

Finance Docket No. 23374

SOUTHERN PACIFIC CO.

v.

GREYHOUND CORP. AND RAILWAY EXPRESS AGENCY, INC.

It appearing, That Railway Express Agency, Incorporated, by an application filed October 7, 1964, in Finance Docket No. 23324, as last supplemented November 17, 1964, seeks authority under sections 20a and 214 of the Interstate Commerce Act to issue 500,000 shares of common stock, par value $1 per share, to be sold to The Greyhound Corporation (Greyhound) at a price of $20 per share; that interested parties listed in the appendix hereto have been permitted to intervene; and that Finance Board No. 2 has certified the application to us for determination;

It further appearing, That the several companies named in section II(b) of the appendix have filed a petition seeking an order requiring Greyhound to file an application under section 5 of the act, and requesting consolidation and hearing of such application on a common record with the application for authority to issue said stock;

It further appearing, That the United States Department of Justice has filed a petition for leave to intervene and for consolidation of the application to issue securities with a proceeding to determine the lawfulness of the proposed transaction under section 7 of the Clayton Act, and for oral

hearing and a prehearing conference for the purpose of formulating the issues;

It further appearing, That by complaint, served November 13, 1964, in Finance Docket No. 23374, Southern Pacific Company requests us to invoke the provisions of section 5 (7) of the act, and after hearing and investigation, to require applicant and Greyhound to cease and desist from consummating the proposed transaction; that by motions filed December 2 and 3, 1964, defendants seek dismissal of the complaint; and that defendants have answered the complaint, and complainant has replied to the motions;

It further appearing, That applicant has replied to all protests and petitions, urging primarily that the application be approved without further proceedings;

It further appearing, That the filing of an application under section 5 of the act is permissive and may not be required by us, see *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line,* 320 I.C.C. 122(127); that an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time; and that a hearing is not necessary for a determination of the application for authority to issue said stock under the provisions of sections 20a and 214.

It further appearing, That applicant's charter authorizes it to issue 2,576,000 shares of common stock, of which 1,999,188 shares are outstanding, owned by some 60 railroads; that said stock is not required to be held only by railroad corporations; that outstanding shares are subject to a right of first refusal by railroad shareholders; and that the shares proposed to be issued to Greyhound will not be subject to such right;

It further appearing, That after the proposed sale to Greyhound of 500,000 shares of applicant's authorized but unissued common stock at $20 per share, Greyhound will offer to purchase from railroad shareholders of applicant up to 1,000,000 shares of outstanding common stock at the same price; and that to comply with terms and conditions of the offer, applicant's board of directors, at a meeting held September 1, 1964, adopted resolutions declaring intentions

(a) to refinance, if necessary, $27,637,054 of outstanding 5-per-cent notes, issued originally to applicant's stockholders, or otherwise to secure waiver or cancellation of a prohibition against payment of dividends; (b) to consider seriously and work toward a long-term agreement between applicant and Greyhound to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage; and (c) to consider seriously at a later time the sale of some stock to airlines and/or the general public if and when conditions appear favorable to the best interests of applicant as a company;

It further appearing, That at a special meeting of applicant's stockholders held October 1, 1964, resolutions approving the proposed stock issue and amending applicant's by-laws to increase the membership of the board of directors from 23 to 25 and to increase the number of directors at large from 5 to 7, were adopted by a vote of 1,654,572 shares for and 269,880 shares opposed to the resolutions; that railroad stockholders have the right to nominate 18 members; that 7 may be nominated by railroads of the eastern district and 6 and 5 may be nominated by western and southern district railroads, respectively; that 5 of the 7 at-large directors may be nominated by bus company holders of at least 20 percent of the stock issued and outstanding; that an affirmative vote of two-thirds of the stock issued and outstanding is required to amend the by-laws in respect of the number of directors nominated by districts; and that for any alteration in the number of directors or in the method of nominating directors at large, the affirmative two-thirds vote shall include a majority of the issued and outstanding stock held by bus company stockholders as aforesaid;

It further appearing, That applicant urgently needs the proceeds of $10,000,000 in its program of acquiring and modernizing terminals and equipment in order to keep operating costs at a reasonable level; that it is handicapped in borrowing to finance capital improvements because of its unfavorable debt-equity ratio; that the proposed issue will improve its ratio as well as reduce to some extent the

amount of future borrowing required; that the price of $20 per share is fair and reasonable; and that the expenses of the issue are estimated at $15,000;

It further appearing, That interveners' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

It further appearing, That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York C. & St. L.R. Co. Control,* 295 I.C.C. 703 (714);

It further appearing, That if in the future the acquisition of control or power to control, or other matter or transaction to which section 5 of the act applies, becomes imminent or apparent, the opportunity will be available for all interested persons to interpose their opposition; and it appearing that Greyhound has acknowledged the requirements of section 5 in this regard and has stated that it will file a timely application; and that nothing herein shall be construed as a determination of any matter under any section of the act, except sections 20a and 214, as expressly determined herein, or as creating a presumption as to the

action which may be taken on any such application under section 5; and

It further appearing, and the said Division so finds, that the proposed issue by Railway Express Agency, Incorporated, of not exceeding 500,000 shares of common stock of the par value of $1 each, as aforesaid, (a) is for a lawful object within its corporate purposes and compatible with the public interest, which is necessary and appropriate for and consistent with the proper performance by it of service to the public as an express company and a common carrier by motor vehicle, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose:

It is ordered, That the United States Department of Justice be, and it is hereby, permitted to intervene.

It is further ordered, That in all other respects, the petitions of interveners for hearing and other proceedings be, and they are hereby, denied.

It is further ordered, That the complaint in Finance Docket No. 23374 be, and it is hereby dismissed.

It is further ordered, That Railway Express Agency, Incorporated, be, and it is hereby, authorized to issue not exceeding 500,000 shares of common stock of the par value of $1 each, to be sold to a non-railroad corporation at a price of not less than $20 per share.

It is further ordered, That this order shall become effective 35 days from the date it is served.

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission.

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, Division 3, dated May 20, 1964, respecting applications filed under sections 20a and 214 of the said act (49 CFR 56.6).

It is further ordered, That the applicant shall submit for the consideration of this Commission three copies of the

journal entries required to record the transaction, and nothing herein is to be construed as approval of the proposed accounting; and

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States.

By the Commission, Division 3.

BERTHA F. ARMES,
Acting Secretary.

(Seal.)

APPENDIX C

STATUTES

Clayton Act, section 7, 38 Stat. 731, as amended, 15 U.S.C. 18:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or

short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

* * * * * * *

Clayton Act, section 11, 38 Stat. 734, as amended, 15 U.S.C. 21:

(a) Authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Fedral Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission or Board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 13, 14, 18, and 19 of this title, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission or Board requiring such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission or Board. If upon such hearing the Commission or Board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in

which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this title, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission or Board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission or Board may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission or Board conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

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Clayton Act, section 16, 38 Stat. 737, 15 U.S.C. 26:

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Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 2, 3, 7 and 8 of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. . . .

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Interstate Commerce Act, section 5, 25 Stat. 380, as amended, 49 U.S.C. 5:

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(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicles are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it neces-

sary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposd transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad

or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to the public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

* * * * * * *

(3) Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more

carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions. In the application of such provisions of section 20a, and 314 of this title, in the case of any such person, the Commission shall authorize the issue or assumption applied for only if it finds that such issue or assumption is consistent with the proper performance of its service to the public by each carrier which is under the control of such person, that it will not impair the ability of any such carrier to perform such service, and that it is otherwise consistent with the public interest.

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(4) It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

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(5) For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in the common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

* * * * * * *

(6) For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

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(7) The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this

section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)-(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

* * * * * * *

(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and

exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.

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(13) As used in paragraphs (2)-(12) of this section, inclusive, the term "carrier" means a carrier by railroad and an express company and a sleeping-car company, subject to this chapter; and a motor carrier subject to chapter 8 of this title; and a water carrier subject to chapter 12 of this title.

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Interstate Commerce Act, section 20a, 41 Stat. 494, as amended, 49 U.S.C. 20a:

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(2) It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the commission by order authorizes such issue or assumption. The commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * * * *

(3) The commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order mod-

ify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of paragraph (2) of this section.

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Interstate Commerce Act, section 214, 49 Stat. 557, as amended, 49 U.S.C. 314:

Common or contract carriers by motor vehicle corporations organized for the purpose of engaging in transportation as such carriers, and corporations authorized by order of the Commission to acquire control of any such carrier, or of two or more such carriers, shall be subject to the provisions of paragraphs (2) to (11), inclusive, of section 20a of this title (including penalties applicable in cases of violations thereof): *Provided, however,* That said provisions shall not apply to such carriers or corporations where the value of capital stock or principal amount of other securities to be issued, together with the value of capital stock and principal amount of other securities then outstanding, does not exceed $1,000,000, nor to the issuance of notes of a maturity of two years or less and aggregating not more than $200,000, which notes aggregating such amount including all outstanding obligations maturing in two years or less may be issued without reference to the percentage which said amounts bear to the total amount of outstanding securities. In the case of capital stock having no par value, the value thereof for the purpose of this section shall be the fair market value as of the date of its issue; and in the case of capital stock having par value, the value for the purpose of this section shall be the fair market value as of the date of its issue, or the par value, whichever is the greater.

Administrative Procedure Act, section 8(b), 60 Stat. 242, 5 U.S.C. 1007(b):

Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof. . . .

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 9205

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, et al., *Plaintiffs,*

and

RINGSBY TRUCK LINES, INC. et al., *Intervening Plaintiffs,*

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Defendants,*

and

RAILWAY EXPRESS AGENCY, INCORPORATED, AND THE GREYHOUND CORPORATION, *Intervening Defendants.*

JUDGMENT OF DISMISSAL

PURSUANT to the Memorandum Opinion filed in the above-entitled action directing the Clerk to forthwith enter a judgment dismissing the action, it is, therefore

ORDERED that the action and plaintiffs' complaint, and the complaints of the intervening plaintiffs be, and the same are hereby, dismissed.

DATED at Denver, Colorado, this 11th day of April, 1966.

BY ORDER OF THE COURT:

G. WALTER BOWMAN,
Clerk.